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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1471

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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ORIGINAL

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (hereinafter NAB) moves pursuant to Rule 42 of this Court for leave to file a brief *amicus curiae* in the above-entitled proceeding.

The NAB is a non-profit association of radio and television broadcast stations and networks. As of April 24, 1974, NAB's membership included 2,370 AM radio stations, 1,506 FM radio stations, 532 television stations and all nationwide commercial broadcast networks. The object of NAB, according to its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

All broadcast stations are subject to the prohibitions of the criminal anti-lottery statute, 18 U.S.C. §1304 (1964), and Federal Communications Commission (hereinafter FCC) rules regarding broadcast of lottery information. 47 C.F.R. §§73.122, 73.292, 73.656 (1972). The FCC has ruled that 18 U.S.C. §1304 and its rules prohibit broadcast stations from announcing the winning number of state-conducted lotteries as part of their regular news reports. *Declaratory Ruling*, 30 F.C.C.2d 794 (1971) (hereinafter cited as *Declaratory Ruling*), *reconsideration denied, Memorandum Opinion and Order*, 36 F.C.C.2d 93 (1972).

NAB respectfully submits that Respondent, NJSLC, does not share NAB's particular interest in assuring that neither Congress nor the FCC abridges the "freedom of the press" guaranteed by the First Amendment. U.S. Const., Amend. 1. The journalistic activities of NAB's member stations are affected directly by the FCC's *Declaratory Ruling*. Unlike

Respondent, NJSLC, broadcast stations are licensed and regulated by the FCC and operate under the constant threat of administrative sanction. Moreover, broadcast stations are "massively engaged in exactly that kind of communication which the First Amendment was written to protect."[1] Whereas Respondent NJSLC is concerned with First Amendment guarantees in the broad sense, NAB is concerned with the encroachment of the FCC on the news and editorial activities of its member stations, which are part of the "free press" directly protected by the First Amendment. *Red Lion Broadcasting Company v. F.C.C.*, 395 U.S. 367, 386 (1969); *United States v. Paramount Pictures, Inc.*, 833 U.S. 131 (1948).

Pursuant to its above-stated object, NAB herein seeks to protect the rights of its member stations to make editorial decisions and disseminate news without fear of government censorship or sanction. We believe that broadcasters as journalists and editors should determine whether or not an item is news and, if so, whether or not it should be broadcast. In its *Declaratory Ruling*, the FCC has pre-empted the news and editorial judgments of broadcasters. NAB submits that in so doing the FCC has ignored the explicit proscriptions of the First Amendment. The Court's action in this case will directly and immediately affect the interests of broadcasters in states which conduct lotteries;[2] but

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[1] Testimony of Bill Monroe, Correspondent, NBC News, before the Subcommittee on Constitutional Rights of the Committee of the Judiciary of the United States Senate, February 2, 1972, cited in *Brandywine-Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 73, n. 44 (1972) (Bazelon, C. J., dissenting).

[2] Data compiled by NAB's staff indicates that 15 states have enacted laws establishing state-conducted lotteries.

all broadcasters may feel the impact of the Court's decision. Whereas this case concerns only the right to report the winning number in a state-conducted lottery in a radio or television station's regular news broadcasts, this Court's decision, if favorable to Petitioner, FCC, could open the door to further action by Congress and the FCC to circumscribe the freedom of the editorial function of broadcast journalists. Thus, NAB and all broadcasters are particularly concerned with the outcome of this case.

Wherefore, in view of the significance of this matter, the NAB respectfully requests that it be granted leave to file the annexed brief *amicus curiae* in the above-instituted proceeding.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

INTEREST OF AMICUS

The National Association of Broadcasters (hereinafter NAB) submits this brief *amicus curiae* in support of Respondent, New Jersey State Lottery Commission (hereinafter NJSLC). The interest of *amicus* NAB has been stated in full in the *Motion for Leave to File Brief Amicus Curiae*, attached hereto.

PRELIMINARY STATEMENT

On September 25, 1968, the Federal Communications Commission (hereinafter FCC) issued a *Declaratory Ruling*,[1] holding that the lottery statute, 18 U.S.C. §1304 (1964), and the FCC's lottery rules, 47 C.F.R. §§73.122, 73.292, 73.656 (1972), applied to state-conducted lotteries. Additionally, the FCC ruled on the legality of several specific types of proposed broadcasts. On August 11, 1969, the United States Court of Appeals for the Second Circuit set aside the *Declaratory Ruling*[2] and remanded it to the FCC for reconsideration in light of the court's holding. *New York State Broadcasters Association, Inc. v. United States*, 414 F.2d 990 (2nd Cir. 1969), *cert. den.*, 396 U.S. 1061 (1970). While agreeing with the FCC that 18 U.S.C. §1304 did apply to state-conducted lotteries, the court held that the prohibition against broadcast of "information concerning any lottery," 18 U.S.C. §1304 (1964), applied "only to information that directly promotes a particular existing lottery." *New York State Broadcasters Association, supra*, at 997. Subsequently, on March 2, 1970, the FCC released a *Supplemental Declaratory Ruling*[3] in response to the court's expectation that the FCC "apply its expertise" in providing "more specific guidance" as to what information may and may not be broadcast.

On February 18, 1971, Jersey Cape Broadcasting Corporation requested that the FCC issue a declaratory ruling as to the broadcast of the following statement during three

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[1] 14 F.C.C.2d 707 (1968).

[2] *Id.*

[3] 21 F.C.C.2d 846 (1970).

consecutive regular newscasts commencing at noon each Thursday, the day on which the winning number of the New Jersey state-conducted lottery was selected:

"The winning state lottery number drawn today is (and then recite the winning number)."

The FCC ruled that the broadcast would violate 18 U.S.C. §1304 and the FCC's Rules, 47 C.F.R. §§73.122, 73,292, 73.656.[4] Petitions for reconsideration filed by the New Jersey State Lottery Commission and by several state and local officials were denied by the FCC.[5] On January 2, 1974, the United States Court of Appeals for the Third Circuit reversed the FCC's *Declaratory Ruling*, holding that the broadcast involved would be unadulterated broadcast journalism and, therefore, protected by the First Amendment and the Communications Act of 1934, 47 U.S.C. §326 (1964). *New Jersey State Lottery Commission v. United States*, ___ F.2d ___ (3rd Cir. 1974).[6]

NAB submits that the decision of the Third Circuit in *New Jersey State Lottery Commission v. United States, supra*, is correct, that the First Amendment does bar FCC censorship of news reports, as well as the imposition of any subsequent sanction for broadcast of a particular news report. Thus, NAB respectfully urges this Court to affirm the decision of the Third Circuit to prevent the FCC from

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[4] *Declaratory Ruling*, 30 F.C.C.2d 794 (1971) (hereinafter cited as *Declaratory Ruling*).

[5] *Memorandum Opinion and Order*, 36 F.C.C.2d 93 (1972) (hereinafter cited as *Reconsideration*).

[6] The court's opinion is reproduced in Petitioners' *Petition for a Writ of Certiorari*, at Appendix A.

illegally and unconstitutionally tampering with the content of radio and television news broadcasts.

ARGUMENT

I. THE FCC'S *DECLARATORY RULING* OPERATES AS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON BROADCAST NEWS.

The federal anti-lottery statute, 18 U.S.C. §1304 (1964), provides that:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

The FCC's Rules, §§73.122, 73.292, 73.656 (1972), are based on 18 U.S.C. §1304 and contain similar language. The FCC's *Declaratory Ruling* explicitly holds that broadcast of the winning number of a state-conducted lottery in a broadcast news report would violate 18 U.S.C. §1304 and the FCC Rules, §§73.122, 73,292, 73.656 (1972). In that

they are not directly prohibitory, but provide for subsequent punishment, the statute, 18 U.S.C. §1304 (1964) and the FCC Rules, §§73.122, 73,292, 73,656, do not constitute a prior restraint *per se*. Nor does the FCC *Declaratory Ruling* have the same direct prohibitory effect as a court injunction. See, *e.g.*, *New York Times v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Nonetheless, in intent and effect it does operate as a prior restraint on the broadcast of a specific news item. Any broadcast licensee would be subject to administrative and criminal sanctions for broadcasting a news report of the winning lottery number, just as the newspaper in *Near v. Minnesota, supra*, was punishable for contempt of court if it published material suppressed by the court's injunction granted pursuant to a Minnesota statute. Thus, Mr. Chief Justice Hughes described the operation of the Minnesota statute as "effective censorship." 283 U.S. at 712. In fact, the FCC's *Declaratory Ruling* falls within the historical and authentic definition of censorship "that no publication can see the light of day unless it is approved in advance by a censor. . . ."[7] Whereas broadcast licensees are not required to submit program material to the FCC for clearance, in this case, a proposed news report was submitted to the FCC *prior to broadcast*, and the FCC ruled that the broadcast was prohibited. Clearly, the FCC's *Declaratory Ruling* can be viewed as nothing less than a prior restraint on broadcast news reporting.

As a prior restraint on broadcast news, the FCC's *Declaratory Ruling* violates the First Amendment. The chief purpose of the First Amendment guarantee of "freedom

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[7] Paul C. Kauper, "The Role of the Press in a Democratic Society", *Editor & Publisher*, February 16, 1974, at 7.

of the press," U.S. Const., Amend. 1, is to prevent previous restraints upon publication. *Near v. Minnesota, supra,* 283 U.S. at 713. Thus, as the Chief Justice indicated in *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971):

> Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity. *Carroll v. Princess Anne,* 393 U.S. 175, 181, 21 L.Ed. 2d 325, 331, 89 S. Ct. 347 (1968); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 9 L.Ed. 2d 584, 593, 83 S. Ct. 631 (1963).

Whereas the protection against prior restraint is not absolute, limitations have been recognized only in exceptional cases. *Near v. Minnesota, supra,* 283 U.S. at 716. For example, the Court in *Near* noted that speech which hindered the nation's war effort, *Schenck v. United States,* 249 U.S. 47, (1919), incitements to violent overthrow of the government or words that have "all the effect of force," *Gompers v. Bucks Stove and Range Co.,* 221 U.S. 418, 439 (1911), might be subject to prior restraint. 283 U.S. at 716. In the more than three decades since *Near v. Minnesota,* no other standards for weighing the broad right of the press to publish and the very narrow right of the government to restrain publication have been developed. *New York Times v. United States,* 403 U.S. 713, 761 (1971).

The present case falls far outside the ambit of the exceptional cases recognized in *Near v. Minnesota, supra.* A news report of the winning lottery number poses no comparable, if indeed any, threat to the continued existence of this nation, its government, or any of its people. In

fact, state governments which operate lotteries, pursuant to legislation, do so to increase state revenues, thereby providing more and better services to the people of the states.

Moreover, what the present case does involve is a restraint on the dissemination of news by the press, and the Court in *Near* never intended to sanction any such restraint. Dissenting in *Kunz v. New York,* 340 U.S. 290, 307 (1957), Mr. Justice Jackson stated that *Near v. Minnesota, supra,* precluded *any* prior restraint on the press:

> Of course, as to the press, there are the best of reasons against any licensing or prior restraint. Decisions such as *Near v. Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S. Ct. 625, *supra,* hold any licensing or prior restraint of the press unconstitutional and I heartily agree.

More recently, in his dissent in *New York Times v. United States, supra,* the Chief Justice pointed out the continuing validity of the principles espoused by the Court in *Near:*

> So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near v. Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S. Ct. 625 (1931) until recently in *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 29 L.Ed. 2d 1, 91 S. Ct. 1575 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting in matters of public interest. 403 U.S. at 748.

This Court consistently has recognized that freedom from prior restraint is the most essential of First Amendment guarantees. The FCC's *Declaratory Ruling* operates

as a prior restraint on and censorship of news. Therefore, NAB submits that the FCC's *Declaratory Ruling* contravenes the most basic constitutional guarantees of freedom of the press.

II. IN DETERMINING THAT A NEWS REPORT OF THE WINNING LOTTERY NUMBER IS A LIMITED NEWS ITEM AND, THUS, NOT ENTITLED TO FIRST AMENDMENT PROTECTION, THE FCC HAS IGNORED THE FULL, UNEQUIVOCAL PROTECTION AFFORDED BROADCAST NEWS BY THE FIRST AMENDMENT.

The FCC's *Declaratory Ruling* that a broadcast news report of the winning lottery number was prohibited apparently was premised on the determination that limited news items are not entitled to the protection of the First Amendment, U.S. Const., Amend. 1. In its *Declaratory Ruling*, the FCC distinguished between legitimate news items of general interest and limited news items. The FCC cited a *bona fide* news announcement of persons who won the top lottery prizes as an example of a legitimate news item and stated explicitly that it was protected by the First Amendment. In contrast, the FCC ruled that a news report of the winning number was the kind of limited news item that was prohibited by 18 U.S.C. §1304 (1964) and the FCC's Rules, 47 C.F.R. §§73.122, 73.292, 73.656 (1972), because it would directly promote a lottery. 30 F.C.C.2d at 795.

The FCC's action severely compromises the full, unequivocal protection afforded radio and television news reporting by the First Amendment. Although radio and television were "unknown media when freedom of the press was written into the Bill of Rights,"[8] speech and press

[8] *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 895 (3d Cir. 1969), *aff'd* 403 U.S. 29 (1971).

on radio and television "are freedoms protected by the First Amendment."[9] In *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948), Mr. Justice Douglas, speaking for an eight-member majority of this Court, first recognized broadcasters' First Amendment rights:

> We have no doubt that moving pictures, like newspapers *and radio*, are included in the press whose freedom is guarantted by the First Amendment. [Emphasis added].

This Court has never retreated from that basic position. Most recently in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 160 (1973), Mr. Justice Douglas, concurring, pointed out that

> [T]he old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez faire regime which the First Amendment sanctions.

Although the special characteristics of the broadcast media have on occasion justified the application of different First Amendment standards to radio and television, the present

[9] *Rumely v. United States*, 197 F.2d 166, 177 (D.C. Cir. 1952), *aff'd* 345 U.S. 41 (1953).

case involves news reporting and is easily distinguishable. In *Red Lion Broadcasting Company v. Federal Communications Commission*, 395 U.S. 367, 390 (1969), this Court found that "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount." Thus, the Court held that the FCC's personal attack rules which require that broadcast licensees provide reply time to persons attacked on their facilities did not violate the First Amendment. However, the Court was careful to note that:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program. . . . Such questions would raise more serious First Amendment issues. 395 U.S. at 396.

Similarly, in *Banzhaf v. Federal Communications Commission*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. den.*, 396 U.S. 482 (1969), the court held that an FCC ruling requiring radio and television stations which carried cigarette advertising to devote broadcast time to views against cigarette smoking did not violate the First Amendment. Chief Judge Bazelon indicated that the court so held because no speech was actually banned and because product advertising is "less vigorously protected than other forms of speech." 405 F.2d at 1101. In contrast, the FCC's *Declaratory Ruling* does actually ban speech. Moreover, it bans, not advertisements, but news, which is entitled to the greatest possible protection of the First Amendment. *Cf. New York Times v. United States*, 403 U.S. 713 (1971).

Radio and television are media of entertainment, instruction, opinion and advertising, but their most vital and distinctive function is rapid dissemination of news. In the *Rosenbloom* case, *supra*, the court recognized the

"more apparent" need for constitutional protection of broadcast news reporting because its primary value to the public is in "conveying the latest news as promptly as possible so that it has the opportunity to be informed of news items of possible immediate public concern." 415 F.2d at 855.

Moreover, broadcasting has become the pre-eminent news medium.[10] Chief Judge Bazelon recently recognized this in his dissent in *Brandywine-Main Line Radio, Inc. v. Federal Communications Commission*, 473 F.2d 16, 73 (D.C. Cir. 1972), *cert. den.*, ___ U.S. ___ (1973):

> Today we have arrived at different constitutional definitions as to what is protected speech. Certainly broadcasting is included. But perhaps more significant is the fact that most Americans now consider television and radio to be their most important news source. [Footnotes omitted].

In this age of rapid, pervasive electronic journalism, the First Amendment would be but a relic of lost freedoms if it failed to fully and unequivocally protect broadcasters' rights to edit and report news without fear of government interference. Clearly, as Mr. Justice Stewart recognized in his concurring opinion in the *Columbia Broadcasting System* case, *supra:*

> The First Amendment prohibits the government from imposing controls upon the press. Private broadcasters are surely part of the press. [Footnote omitted]. 412 U.S. at 133.

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[10] 1972 survey conducted by the Roper Organization, Inc., showed television to be the main source of news. What the People Think of Television and Other Mass Media 1959-1972, Report by the Roper Organization, Inc., p. 2, May 1973.

Moreover, in reserving for itself the power to decide what is legitimate news and what is limited news, the FCC has shown utter disregard for the fundamental First Amendment value that editorial judgments be made by editors. This principle was stated most succinctly by Mr. Justice Stewart, concurring in *Columbia Broadcasting System, supra:*

> For if [First Amendment] "values" mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters or imposed by bureaucratic fiat, the choice must be for freedom. 412 U.S. at 146.

NAB respectfully submits that in this regard it is particularly important that the decision of the Third Circuit be affirmed. Any notion that the FCC can impose its journalistic judgments on broadcast news editors must be dispelled and disavowed by this Court. A free press is truly free only if editorial decisions can be made in an atmosphere unpolluted by the threat of government censorship. or sanction. If the decision of this Court in this case leaves even the slightest impression that the FCC can, on occasion, act as a super editor of broadcast news, the federal government will have gained an unprecedented stranglehold on the flow of news to the American people. The door would be opened for Congressional, Executive and administrative actions, purportedly to protect the public interest, restricting dissemination of certain news items, deemed limited news items so as to circumvent the otherwise uncompromising guarantees of the First Amendment. Even the remotest possibility of this sort of government supervision of the press must be foreclosed.

CONCLUSION

Amicus NAB submits that the FCC's *Declaratory Ruling* imposes an unconstitutional prior restraint on broadcast news reporting. Moreover, in determining the newsworthiness of a certain item the FCC has supplanted the editorial judgments of broadcast licensees. The First Amendment will not tolerate such government interference with broadcast news reporting. Broadcast journalists are part of the press entitled to the full, unequivocal protection of the First Amendment, and prior restraints are particularly antithetical to First Amendment values. Furthermore, Congress provided that the FCC should be a regulator, not a censor or an editor. Nothing could be more contrary to the FCC's prescribed role or present a more insidious threat to freedom of the press than FCC censorship of broadcast news reporting.

NAB respectfully submits that this Court should not accord the slightest recognition to any right of the FCC to declare broadcasts of certain news items illegal. The First Amendment must continue to stand as an impenetrable barrier to the tentacles of government censorship or control of broadcast news. In short, the press is either free or it is not free to report the news as it sees fit, and, once the door is open to government control, it is not free.

WHEREFORE, for the reasons stated, NAB respectfully requests that this Court affirm the judgment of the Court of Appeals for the Third Circuit holding the FCC's *Declaratory Ruling* an unconstitutional abridgement of freedom of the press.

Respectfully submitted,

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